IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 16574-75 of 2006 and 16576-77/2006

KLM ROYAL DUTCH AIRLINES ...Petitioner through
Mr. C.S. Aggarwal, Sr. Adv. with Mr. Prakash Kumar, Adv.

Versus

ASSISTANT DIRECTOR OF INCOME-TAX ...Respondent through
Mr. Sanjeev Sabharwal, Adv.

Date of Hearing : December 20, 2006

Date of Decision : January 12, 2007

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether reporters of local papers may be allowed to see the Judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the Judgment should be reported in the Digest? Yes

J U D G M E N T

1. In these writ petitions the Order disposing of the Objections filed by KLM Dutch Airlines ('Assessee' for short) to the initiation of re-assessment proceedings has been challenged; a prayer has also been made for the issuance of a writ of Certiorari or any like Order quashing the impugned Notice under Section 148 of the Income-Tax Act [for short 'IT Act'] dated 8.3.2006; and for

quashing the re-assessment proceedings initiated in pursuance to the Notice dated 8.3.2006. The assailed Notice pertains to Assessment Year (AY) 2001-2002 in WP(C) 16576-77 and to AY 2003-2004 in WP(C) No.16574-75. On a perusal of the impugned Notice it appears that the Assistant Director of Income Tax [for short Assessing Officer(AO)] intends to 'reassess' the income of the Petitioner/Assessee inter alia since the word 'assessed' has been scored out. This is noteworthy since avowedly no assessment has in fact been framed.

2. The Assessee had filed its Return of Income under Section 139 of the IT Act on 31.10.2002 for AY 2002-03 declaring a 'nil taxable income' and consequently seeking a refund of tax deducted/deposited. Exemption under Section 90 of the IT Act has been claimed in respect of income earned from “technical handling”. On 19.1.2004 a notice under Section 148 of the IT Act was issued in respect of AY 2002-2003. In response thereto the Assessee filed its Return of Income once again declaring nil taxable income. The AO thereupon issued a Questionnaire dated 21.3.2005 inter alia containing the following queries:

> Why receipts from technical handling is not taxable, furnish the evidence regarding claim that receipt is covered under DTAA?

What is technical handling and apportioned expenses? Furnish evidence for the amount received under technical handling and expenses incurred?

Assessee's case is that these queries were duly answered in terms of its letter dated 28.3.2005. The Assessee thereafter received the impugned Notice dated 8.3.2006 also under Sections 147-148 of the IT Act stating that the AO had 'reason to believe' that income had escaped assessment, this view having been concurred with by the Commissioner of Income Tax. The Assessee again furnished its Return of Income though under protest and simultaneously requested for supply of the reasons recorded for issuance of the Notice dated 8.3.2006. On 10.4.2006 a notice under Section 143(2) of the IT Act seeking further information was issued. Thereupon, the following reasons recorded on 8.3.2006 for the issuance of the Notice under Section 148 of the IT Act were conveyed by the AO to the Assessee on 3.7.2006:-

M/s KLM Royal Dutch Airlines Netherlands

AY 2002-03

Reasons for Issuance of Notice u/s 148 of the Income Tax Act, 1961

The assessee is a company incorporated in Netherlands. It is into the business operations of aircraft in international business as well as rendering of technical services to other airlines. The assessee during the year under consideration has declared the income from

rendering of technical services in its return of income and has claimed the same to be covered under Article-8 of the DTAA between Indian and Netherlands. However, no assessment for the relevant assessment year has been made u/s 143(3) of the Income Tax Act, 1961. It is a settled position, in the light of the decision of Delhi ITAT in the case of British Airways PLC, that income from rendering of technical services cannot be claimed as covered under Article 8 of the DTAA. Therefore, the income from rendering technical services shall be subjected to tax in India.

In view of the foregoing I have reasons to believe that income chargeable to tax has escaped assessment for the relevant assessment year within the meaning of Section 147 r.w.s. 148 of the Income Tax Act, 1961.

(Pravin Rawal)
Assessing Officer

By letter dated 24.7.2006 the Assessee filed Objections to the initiation of re-assessment proceedings. Subsequently, a letter dated 6.10.2006 was issued by the AO to the Assessee granting it a final opportunity to comply with the Notice under Section 142 (1) by 12.10.2006, failing which the AO would make the assessment as per provisions of Section 144 of the IT Act. It is at this stage that the present Writ Petition has been filed.

3. In respect of AY 2003-2004, on 25.2.2004 the Assessee *suo moto* filed its Return of Income for AY 2003-2004 on the same lines as in the previous year. A Notice dated 29.12.2004 under Section 143(2) of the IT Act came to be issued to the Assessee, inexplicably at the address of its Chartered Accountant. This was followed by a Notice dated 16.9.2005 under Section 143(2) of the IT Act issued yet again at the address of the Chartered Accountant, followed by a Notice under Section 142(1) of the IT Act dated 10.10.2005 raising certain specific queries one amongst them being:-

> "Please furnish details of all foreign payments made in connection with your operations in India including payments relating to engineering and technical handling services".

The Assessee asseverates that a detailed Reply dated 13.2.2006 had been forwarded in which the Questionnaire had been duly replied to. One of the grounds taken therein was that a notice under Section 142(1) had been received by the Assessee on 14.10.2005; and since no action had been started under Section 143(2) hence the proposed action was barred by limitation. It is at this stage that the impugned Notice dated 8.3.2006 under Section 148 came to be issued, which was responded to in terms of the Assessee's letter dated 7.4.2006 along with the demanded

Return of Income. The next event is the issuance of a Notice under Section 143(2) of the IT Act, replied to by the Assessee in terms of the letter dated 17.4.2006 praying inter alia for furnishing a copy of the reasons. These are identical to the 'reasons' dated 8.3.2006 already extracted above. On 24.7.2006, in respect of AY 2003-2004 the Assessee filed Objections to the initiation of re-assessment proceedings which have been rejected by the impugned undated common Order pertaining to both AYs, stated to have been received by the Assessee on 19.7.2006.

4. At this stage it will be relevant to take note of two decisions of the Income Tax Appellate Authority (ITAT) on the subject under consideration. On 24.9.2001 in the matter of ***British Airways*** *Plc. -vs- Deputy Commissioner of Income-Tax*, 80 ITD 90 the ITAT Delhi-A Bench had come to the conclusion that so far as British Airways was concerned “the rendering of engineering and ground handling services to other airlines are in no way inextricably linked with the operation of the aircrafts. If for any reason the assessee stops rendering these services to the other airlines, the activity of transport of international traffic in persons and cargo will not be affected in any manner. .... Thus, in the ultimate analysis, applying the analogy discussed in detail while

interpreting Article 8 of DTAA, I am fully in agreement with the finding of the authorities below that the present activity cannot be taxed under section 44BBA of the Income-tax Act, 1961". Thereafter, on 12.2.2004 ITAT Delhi-B Bench has decided ***Lufthansa*** *German Airlines -vs- Deputy Commissioner of Income-Tax*, 90 ITD 310 and "noted that as per Article 8(4) of DTAA between India and Germany, the profit from the participation "in a pool" will not be taxable in India. But Article 8(2) of DTAA between India and UK talks of "participation in pool of any kind by enterprises engaged in air transport". The use of the word "pools" envisages that there could be several pools or understanding i.e. more than one. Here the word "pool" does not indicate a pool which is internationally recognized. The use of the word "pools of any kind" clearly indicates that it was in the nature of commercially understood meaning. But in the international aviation industry, there is only one pool i.e. IATP. Certainly, in the case of ***British Airways***, it was not a case of participation in a pool. In the appellant's case, it is participation in IATP only. This was the reason that the ITAT has to find out the meaning of the word "pool" in the case of ***British Airways***. Moreover, in the case of ***British Airways***, it was "pools of any kind" but in the case of the appellant, it was not a pool of any

kind but only IATP. Thus, the facts in the case of British Airways were altogether different then the facts of the appellant's case and the view taken by the ITAT in the case of British Airways is not applicable in the case of appellant as the facts are entirely different. We have also noted that British Airways has rendered services to Atlas Air Corporation which is not a member of IATP. The services rendered to that airline could not be bound by IATP manual." We cannot ignore the fact that the ***Lufthansa*** decision has not been taken into consideration by the Revenue in the "reasons for issuance of notice u/s 148 of the Income-Tax Act, 1961 dated 8.3.2006".

5. Mr. C.S. Aggarwal, learned Senior Counsel for the Assessee has emphasised upon the distinction between the two airlines decisions delivered by different Benches of the ITAT. According to him, ***British Airways*** had been extending technical handling services to entities not covered by the DTAA and hence was found not to be entitled to the benefits of the Treaty, whereas this was not the position in the ***Lufthansa*** case. It was for this reason that the Assessee had, in the Objections filed in consonance with the ratio of ***GKN Drive*** *Shafts (India) Ltd. -vs- ITO*, 259 ITR 19 (SC), specifically relied on the ***Lufthansa*** case, which, according

to the Assessee, applies on all fours in its favour. We, however, shall steer clear from recording any conclusion on this aspect since it is not called for in the context of the present Writ Petitions. Presently, we are not concerned with the merits of the dispute; the only question is whether the pending proceedings under Sections 147/148 are palpably devoid of jurisdiction and hence are liable to be terminated through the exercise of the jurisdiction vested in this Court under Articles 226 and 227 of the Constitution of India.

6. Mr. Sanjeev Sabharwal, learned counsel for the Respondent/Revenue has set-out in sequential order the manner in which re-assessment proceedings should be conducted. It would commence with the recording of 'reasons to believe' on the basis of the information received by the AO that income chargeable to tax has escaped assessment. It appears to us that where an assessment has not been framed at all it is not possible to posit that income has 'escaped' assessment. Notice under Section 147 calling upon the Assessee to file its Return of Income would thereupon be issued with the consequence that the Assessee would have to file its Return of Income. Simultaneously with or immediately after the Assessee makes this compliance it

would be entitled to be apprised of the 'reasons to believe' which had constituted the springboard for the Sections 147/148 action. The Assessee would then have the right to file Objections remonstrating against the assumption of re-assessment proceedings which would have to be answered by the AO before delving further in the assessment, re-assessment or re-computation proceedings as the case may be. Mr. Sabharwal's contention that during Re-assessment since the AO has to clarify the contents of the Return and/or the escaped income notices under Section 143(3) are to be issued within twelve months, is not free from doubt. He has not clarified as to whether this procedure can be followed without completing the relevant pending assessment.

7. In our opinion Sections 147/148 cannot be interpreted in isolation of the other provisions of Chapter-XIV of the IT Act which is the fasciculous dealing with the procedure for Assessment. Section 139 makes it mandatory for every person whose total income exceeds the maximum amount which is not chargeable to Income-Tax, to furnish a Return of Income by the due date. Section 142 deals with the inquiry before Assessment. The first sub-section thereof empowers the AO to issue a notice to

any person to file a Return or to produce its Accounts or any documents or to provide any information as the AO may require. Sub-section(2) empowers the AO to make any inquiry he considers necessary. Sub-section (3) incorporates the *audi alteram partem* rule of natural justice viz. providing to the affected party an opportunity of being heard. Section 143 deals with the dispatch of intimations specifying the sum payable as tax or interest that has been found by the AO to be due on the basis of the Return; it deals with refunds payable to the Assessee. The neat question which arises before us is whether on the commencement of assessment proceedings must they first be brought to their logical conclusion by framing an assessment before embarking on the proceedings as envisaged in Sections 147/148 of the IT Act; or more precisely stated, can resort to Section 147 be made even whilst the normal assessment proceedings are pending conclusion. To find the answer we must keep in perspective that every Return of Income filed under Section 139 may not result in its active and in-depth perusal or consideration by the AO as it may receive an automatic onward passage under Section 143(1). However, once an inquiry has been initiated by the AO, it cannot but result in either the Return being accepted as having been correctly computed by the

concerned Assessee, or for an Assessment being conducted and concluded thereon by the AO. The provisions of Section 147 would have no role to play at this stage of the proceedings. Once a Return of Income attracts the attention and scrutiny of the AO, it is his bounden duty to delve into every aspect thereof. The AO is sufficiently empowered to ask for all information necessary for framing the Assessment. The only fetter on the amplitude of his discretion is that the Assessment must be framed within the time limit set-down by Section 153 which, in substance, is two years from the end of the Assessment Year in which the income was first assessable or one year from the end of the Financial Year. A perusal of its second sub-section makes it clear that proceedings under Section 147 are altogether different to those under Section 143. This distinction appears to have escaped the attention of the Revenue. Sub-section(2) stipulates that no order under Section 147 shall be made after the expiry of one year from the end of the Financial Year in which notice under Section 148 was served.

8. Section 147 of the IT Act deals with the powers of the AO to 'assess' or reassess the income chargeable to tax which has escaped assessment. Section 148 contemplates making the 'assessment', reassessment or recomputation under Section 147.

Keeping the factual matrix before us in perspective, it becomes critical to define the word assess since the AO is avowedly not reassessing or recomputing the income presented by the assessee for taxation in the form of its Return. It is trite that the words assess, reassess or recompute are not synonymous of each other. It seems to us that an assessment must entail a conscious and concerted calculation carried out by the concerned officer with a view to determine the amount of tax payable by any person. The exercise commencing with Section 139 and ending at Section 145A cannot be interpreted as identical to or overlapping Sections 147/148/149. They are predicated on different circumstances and operate in disparate dimensions. The IT Act makes it incumbent upon every person whose total income exceeds the maximum amount which is not chargeable to Income-Tax to file a Return of Income in order to kick-start the normal assessment procedure. However, it may happen that a person fails to file a Return of Income, say for the AY 2000-2001, even though he is liable to pay tax. It could also happen that a person may file a Return of Income incorrectly offering for purposes of taxation a sum lower than the correctly calculated income. Both these situations have been obviously kept in view in 2nd Explanation to Section 147 and in its clauses (a) and (b). In either

event the AO would invoke the powers conferred upon him by Section 147 of the IT Act culminating with the completion of the assessment. It is also conceivable that the incorrectness of the Return may not be detected or noticed within the time period set-down in Section 153. In these circumstances if the AO has reason to believe, predicated on information received by him, that income chargeable to tax has escaped assessment, he would invoke the powers under section 147. On the other hand, where a Return of Income has been filed but has been taken at its face value, without any proceedings under Section 143(2) and 143(3) having been conducted, no assessment exercise would obviously have been undertaken. After the expiry of the time period set-down in Section 153, this situation can be remedied by the AO by invoking Section 147. The word 'assessment' has been defined in the Act in a most unsatisfactory manner, merely by stating that it includes reassessment. A more comprehensive definition is readily available in the Australian decision titled *Batagol -vs- Federal Commissioner of Taxation*, (1963) 109 CLR 243 in these words:

> "assessment means the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will

become due and payable as the proper tax in that case".

9. A 'clearance' or notice or intimation under Section 143(1) of the Act clearly falls beyond the parameters of this definition. In *Punjab Tractors Ltd. -vs- Joint Commissioner of Income-Tax*, [2002] 254 ITR 243 it was opined that it is not necessary that assessment should have been finalised under Section 143(3) before it can be 'reopened' under Section 147, since an intimation under Section 143(1) operates an order of assessment unless the AO proceeds to give notice under Section 143(2) and passes an Order under Section 143(3). This very understanding of the law has been articulated by the Division Bench of the Allahabad High Court in *Pradeep Kumar Har Saran Lal -vs- Assessing Officer*, [1998] 229 ITR 46 which, in turn, followed the view of the Calcutta High Court in *Jorawar Singh Baid -vs- CIT (Asstt.)*, [1992] 198 ITR 47 wherein it has been observed that -"the power that can be exercised under section 143(2) to correct the assessment made under section 143(1) does not exclude the power of the Assessing Officer to reopen the assessment under section 147 if the ingredients of section 147 are satisfied. It is open to the Assessing Officer to invoke the jurisdiction under section 147, notwithstanding the fact that there are other

remedies open to him under the Act. It cannot, therefore, be accepted that the reassessment under section 147 is vitiated because the Assessing Officer failed to invoke his power to correct the assessment already completed under section 143(1) by issuing a notice under section 143(2) of the Act". However, in the present case since inquiries had been initiated under Section 143(2), it became mandatory that they should have culminated in an order under Section 143(3).

10. In *Trustees of H.E.H. The Nizam's Supplemental Family Trust -vs- CIT*, [2000] 242 ITR 381(SC) the Apex Court has observed that it is "settled law that unless the return of Income already filed is disposed of, notice for reassessment under Section 148 of the Income-tax Act, 1961, cannot be issued, i.e., no reassessment proceedings can be initiated so long as assessment proceedings pending on the basis of the return already filed are not terminated. According to the Revenue it is immaterial whether the order is communicated or not and the only bar to the reassessment proceedings is that proceedings on the return already filed should have been terminated". The following concluding passage from the said Judgment is self-explanatory:-

> A return of income filed in the form prescribed

along with an application for refund under section 237 of the Act is a valid return. There is no stopping the Income-tax Officer to complete the assessment on the basis of the return so filed. It may be that the Income-tax Officer may limit the scope of examination of the return to satisfy himself regarding the correctness of the amount claimed as refund. For that purpose, he will examine if the tax paid by the assessee exceeds the amount of tax with which he is chargeable. If it is found that the income was "nil", he will direct that refund be granted to the assessee of any amount of tax paid. That will certainly be assessment. The filing of a return in the form prescribed under section 139 of the Act along with the application for refund is not an empty formality. It assumes importance if such return had not been filed earlier. We have reproduced the note/order dated November 10, 1965, on the file pertaining to the assessment year 1963-64. In the file for the assessment year 1962-63 there is another note which is as under:-

> "Please see my note in 1963-64 file. Refund to be considered in the hands of the beneficiaries".

A mere glance at this note would show that it could not be said that the Income-tax Officer gave finality to the refund since no refund is granted either in the hands of the trust or in the hands of the beneficiaries. It is an inconclusive note where the Income-tax Officer left the matter at the stage of consideration even with regard to refund in the hands of the beneficiaries. This note was also not communicated to the trustees. When we examine

> the note dated November 10, 1965, on the file of 1963-64 nothing flows from that as well. In any case if it is an order, it would be appealable under section 249 of the Act. Since the period of limitation starts from the date of intimation of such an order, it is imperative that such an order be communicated to the assessee. Had the Income-tax Officer passed any final order, it would have been communicated to the assessee within a reasonable period. In any case, what we find is that the note dated November 10, 1965, is merely an internal endorsement on the file without there being an indication if the refund application has been finally rejected. By merely recording that in his opinion, no credit for tax deducted at source is to be allowed, the Income-tax Officer cannot be said to have closed the proceedings finally. The decisions referred to by the Revenue are of no help in the present case. We are, thus, of the opinion that during the pendency of the return filed under section 139 of the Act along with the refund application under section 237 of the Act, action could not have been taken under section 147/148 of the Act. Our answer to the question, therefore, is in the negative, i.e., against the Revenue.
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> (underling added)

11. We would arrive at this very destination even if we were to traverse along a different dialectic, namely, if we were to analyse the circumstances in which Section 147 of the IT Act could be invoked. There is plenitude of precedents on this aspect of the

law; hence only some of them shall be discussed. The question that had arisen before the Bombay High Court in *Western Outdoor Interactive P. Ltd. -vs- A.K. Phute, Income-Tax Officer*, [2006] 286 ITR 620(Bom) was whether, upon the Rectification being set aside by the Commissioner(Appeals), notice for reassessment on the same grounds could validly be initiated; there was no failure on the part of the assessee to disclose material facts and no fresh information had been received by the AO. At best, it was possible to say that two views were available and in such a situation it was held that the said provision was not available. In particular, the Bench noted the following enunciation of the law in *Indian Oil Corporation -vs- ITO*, [1986] 159 ITR 956(SC):

> The principles on this branch of law are well-settled.
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> To confer jurisdiction under clause (a) of section 147 of the Act beyond the period of four years but within a period of eight years from the end of the relevant year under section 148, two conditions were required to be fulfilled: the first is that the Income-tax Officer must have reason to believe that the income, profits or gains chargeable to tax had been underassessed or escaped assessment; the second is that he must have reason to believe that such escapement or underassessment was occasioned by reason, so far as relevant for the present

purpose, to disclose fully and truly all material facts necessary for the assessment of that year. Both these conditions are conditions precedent to be satisfied. See, in this connection, the observations of this court in ***Calcutta Discount*** *Co. Ltd. -vs- ITO*, [1961] 41 ITR 191.

As is well-settled now by the several authorities of this court and of several High Courts, there must be materials to come to the conclusion that there was 'omission or failure to disclose fully and truly all material facts necessary for the assessment of the year'. It postulates a duty on every assessee to disclose fully and truly all material facts necessary for the assessment. Therefore, an obligation is to disclose facts; secondly, those which are material; thirdly, the disclosure must be full and fourthly, true. What facts are material and necessary for assessment will differ from case to case. In every assessment proceeding, for computing or determining the property tax due from the assessee, it is necessary to know all the facts which help the assessing authority in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assesssing authority has to draw inferences as to certain other facts. But on the primary facts, it is for the taxing authority to draw inferences. It is not necessary for the assessee to draw inferences for him. See, in this connection, the observations in ***Calcutta Discount***.

12. The Full Bench of this Court in *Commissioner of Income-Tax -vs-* ***Kelvinator*** *of India Ltd.,* [2002] 256 ITR 1 had opined that the amendments introduced into Section 147 with effect from 1.4.1989 have not altered the position that a mere change of opinion of the AO was not sufficient ground for embarking on a reassessment. ***Calcutta Discount*** was duly considered and applied by the Full Bench. The Full Bench further observed that an order of assessment must be presumed to have been passed by the AO concerned after due and proper application of mind. In these circumstances the decision of the Division Bench in ***Consolidated Photo*** *and Finvest Ltd. -vs- Assistant Commissioner of Income-Tax*, [2006] 281 ITR 394(Delhi), inasmuch as it is irreconcilable with the views of the Full Bench, must be held not to lay down the correct law. This is especially so since the assessment proceedings had not come to an end under the first sub-section of Section 143, but under the third sub-section. A Division Bench of a particular High Court is fully bound by the view preferred by a larger Bench of that Court, regardless of the fact that another High Court prefers a different view [in this case that of the Gujarat High Court as in *Gruh Finance Ltd. -vs- Joint Commissioner of Income-Tax (Assessment)*, [2000] 243 ITR482, ***Praful Chunilal Patel*** *-vs- M.J. Makwana,*

Assistant CIT, [1999] 236 ITR 832(Guj.) and ***Garden Silk Mills*** *Ltd. -vs- Deputy CIT (No.1)*, [1996] 222 ITR 27(Guj.)]. The Full Bench of this Court has taken into consideration both ***Praful Chunilal Patel*** as well as ***Garden Silk Mills***. In ***Kelvinator*** the Full Bench had also analysed the earlier Division Bench decisions, namely, ***Jindal Photo*** *Films Ltd. -vs- Deputy Commissioner of Income-Tax*, [1998] 234 ITR 170 presided over by R.C. Lahoti, J. (as learned Chief Justice of India then was) and ***Bawa Abhai Singh*** *-vs- Deputy Commissioner of Income-Tax*, [2002] 253 ITR 83 comprising Arijit Pasayat and D.K. Jain (as their Lordships then were). It is quite possible that had the Court in ***Consolidated Photo*** been made aware of the consistent opinion of this Court in ***Jindal Photo*** and ***Bawa Abhai Singh***, their conclusion may have been totally different, notwithstanding alternative view of the Gujarat High Court.

13. It also needs to be clarified that in *Mahanagar Telephone Nigam Ltd. -vs- Chairman, Central Board of Direct Taxes*, [2000] 246 ITR 173 the Division Bench of this Court opined that an intimation under Section 143(1)(a) cannot be treated to be an Order of Assessment. Therefore, although the assessment had been completed under Section 143(1)(a), recourse could be taken

to Section 147. In that case while finalising assessment for the AY 1996-1997 under Section 143 it was found that the claim of license fee made by the assessee was erroneous and should have been disallowed.

14. The diametrically opposite position had arisen in *Commissioner of Income-Tax -vs- Sun Engineering Works P. Ltd.*, [1992] 198 ITR 297(SC). It was held that "in the reassessment proceedings, it is not open to an assessee to seek a review of the concluded item, unconnected with the escapement of income, for the purpose of computation of the income escaping assessment; and, therefore, the Tribunal was right in holding that the respondent was not entitled to reagitate the question of the set-off of losses in the reassessment proceedings". In other words, reassessment must invariably be preceded by a conclusion of the original proceedings. The decision of the Supreme Court in *Esthuri Aswathiah -vs- ITO*, [1961] 41 ITR 539; 1961[2] SCR 911 was applied by the Division Bench of the Madras High Court in *M. Ct. Muthuraman -vs- Commissioner of Income-Tax, Madras*, [1963] 50 ITR 656 in reaching the conclusion that for the AYs 1953-54 and 1954-55 the proceedings were lawfully terminated by the remark "N.A." on the Assessment File and notices under

Section 34 of the Indian Income-Tax Act, 1922 were not invalid. With regard to the AYs 1950-51 and 1951-1952 the assessment proceedings have not been closed in any manner and as they were pending, the notices under Section 34 were invalid. Finally, the notice for AY 1952-1953 was invalid as the notice was issued before the date on which the Appeal in respect of that year was disposed of.

15. Applying this line of decisions to the facts of the present case, the inescapable conclusion that would have to be reached is that while assessment proceedings remain inchoate, no 'fresh evidence or material' could possibly be unearthed. If any such material or evidence is available, there would be no restrictions or constraints on its being taken into consideration by the AO for framing the then current assessment. If the assessment is not framed before the expiry of the period of limitation for a particular AY, it would have to be assumed that since proceedings had not been opened under Section 143(2), the Return had been accepted as correct. It may be argued that thereafter recourse could be taken to Section 147, provided fresh material had been received by the AO after the expiry of limitation fixed for framing the original assessment. So far as the

present case is concerned we are of the view that it is evident that, faced with severe paucity of time, the AO had attempted to travel the path of Section 147 in the vain attempt to enlarge the time available for framing the assessment. This is not permissible in law.

16. Mr. Sabharwal, learned counsel for the Revenue, has also challenged the legal propriety of the present writ proceedings. We have already recorded our view on this aspect of the law in WP(C) Nos.4997/2005, 5010/2005, 5062/2005 titled *Basu Distributors Pvt. Ltd. -vs- Income-Tax Officer Ward 2(3), New Delhi* decided on 15th December, 2006 and we do not intend to make this Judgment prolix by reproducing them. Suffice it to state that wherever and whenever it appears to the High Court that proceedings have been initiated or are continuing without the authority of the law the High Court would be in dereliction of duty if it hesitated in exercising the extraordinary powers contained under Articles 226/227 of the Constitution of India. In the present case since the AO was duty-bound to conclude the assessment before resorting to Section 147 of the IT Act, it is our bounden duty to issue a writ of Certiorari so as to bring these legal proceedings to a definitive halt. The dicta in ***GKN Drive***

has been not duly followed since the Objections filed by the Petitioners, in our view, have been disposed off contrary to law.

17. In this analysis the Writ Petitions are allowed. The initiation of proceeding under Section 147 of the IT Act was irregular and illegal on the short ground that Returns of Income having been filed and since no order of assessment had been finalised by the AO, there was no scope for invoking Section 147. The pending proceedings are quashed. Since this aspect of the law has already been clarified in various decisions, the Petitioner shall be entitled to costs quantified nominally at Rs.25,000/-. Costs to be paid within six weeks.

VIKRAMAJIT SEN, J

S. MURALIDHAR, J

January 12, 2007
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